No. 12591.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FAHEY, *et al.*,
and
FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,
Appellants,

vs.

O'MELVENY & MYERS and RICHARD FITZPATRICK
and
W. I. GILBERT, JR.,
and
MALLONEE, *et al.*, THE SHAREHOLDERS, PROTECTIVE COMMITTEE,
and
LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,
Appellees.

On Appeal From the United States District Court for the Southern District of California Central Division

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Brief for Appellees Mallonee, et al., the Shareholders' Protective Committee and Long Beach Federal Savings and Loan Association as Respondents in Appeal From "Order Re: Allowance of Attorneys' Fees on Account" to O'Melveny & Myers and Richard Fitzpatrick, and W. I. Gilbert, Jr.

FILED
DEC 17 1951
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(Partial)

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APPEAL.

"THE LABOURER IS WORTHY OF HIS REWARD."
(1 Timothy V-18 or Luke X-7)

This "Appeal No. 12591" is from "Findings of Fact, Conclusions of Law, and Order *re* Allowance of Attor-

from clouds created by seizures and wholesale assignments and transfers of seized assets by appellants.

10. *Fahey, et al. v. Mallonee, et al.,* No. 12511, one of six appeals presently pending before this Court of Appeals, the record on which single appeal comprises 24 volumes of over 11,000 printed pages.

11. *Petition by Fahey, et al., for writ of prohibition, mandamus or other appropriate writ, v. United States District Judge Peirson M. Hall.* Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

12. *Petition by Federal Home Loan Bank of San Francisco, et al., for writ of prohibition, mandamus or other appropriate writ v. United States District Judge Peirson M. Hall.* Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

13. *Fahey, et al. v. Ronald Walker, Special Master, of the United States District Court,* No. 12575, presently pending appeal from order allowing fees to Special Master, taken May 3-5, 1950. Appellees' motions to dismiss this appeal were argued on October 19, 1951.

14. *Fahey, et al. v. O'Melveny & Myers, et al.,* No. 12591, presently pending appeal from order allowing attorneys' fees, taken June 20, 1950.

15. *Fahey, et al. v. Ronald Walker, Special Master of the United States District Court,* No. 12575, presently pending appeal from orders allowing fees to Special Master, taken about November 28, 1950, and December 8, 1950.

16. *Fahey, et al. v. Ronald Walker, Special Master of the United States District Court,* No. 12893, presently pending appeal from order allowing fees to Special Master, taken February, 1951.

17. *Fahey, et al. v. Ronald Walker, Special Master of the United States District Court,* No. 13055, presently pending appeal from order allowing fees to Special Master, taken about May 23, 1951.

CONGRESSIONAL INVESTIGATIONS.

1. Tenth Intermediate Report of the Select Committee to Investigate Executive Agencies, Seventy-Ninth Congress, Second Session, Investigation of Federal Home Loan Bank Administration, dated July 25, 1946.

2. 1950-51 Investigation by Representative Holifield's Special House Subcommittee of the Committee on Expenditures in the Executive Departments, investigating the Home Loan Bank Board. This investigation is presently in recess.

JURISDICTIONAL STATEMENT.

The U. S. District Court had, and has, jurisdiction of these *in rem* and *quasi in rem* actions to determine ownership of approximately $145,000,000.00 of real and personal property, all physically located within the district of California.

These actions seek to recover physical possession of, remove clouds, liens, and encumbrances upon, and to quiet title to, said properties fraudulently and unlawfully seized, without notice or hearing.

It is alleged in the jurisdictional paragraphs of the various complaints, cross-claims, third-party complaints, and similar documents[2] that the District Court has jurisdiction of the res and of these actions:

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[2]References to the various pleadings are in Appeal No. 12511, R. 2, 287, 323, 566, 2962, 3190, 6738, 6802, 6852, 9466, and others.

(1) IN REM.

By quiet title statute, 28 U. S. C. 118—now Section 1655;

(2) IN INTERPLEADER.

(a) By statute, 28 U. S. C. 41(26)—now Sections 1335, 1397, and 2361;

(b) By Rule 22, F. R. C. P.;

(c) By inherent equity interpleader jurisdiction.

(3) UNDER THE ADMINISTRATIVE PROCEDURE ACT.

5 U. S. C. A. 1001-1011, Public Law 404, 79th Congress, Chapter 324, 2nd Session, and particularly Section 1009 U. S. C. (Sec. 10 of said Act), which provides in part as follows:

> "(a) Rights of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." (Emphasis added.)

(4) DIVERSITY OF CITIZENSHIP.

There is diversity of citizenship.

> *California Associations, Banks, Stockholders and Shareholders v. Foreign Defendants: Ammann of Maryland, Fahey of Massachusetts, Divers of Ohio, LaRoque of North Carolina, Adams of New Jersey, the Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation, Claiming Residence in Washington, D. C., and doing business in California.*

The non-resident defendants have all been served with process, either in California, or pursuant to court order for service on absent defendants, wherever the United States Marshal could find them.

Quieting title and interpleader jurisdiction, both to summon and to enjoin, run throughout the United States.

(5) FEDERAL QUESTIONS.

Federal questions involved are the constitutionality, interpretation, application, and effect of:

(1) **The Federal Home Loan Bank Act, 47 Stat. 725, 12 U. S. C. 1421,** under which defendants Federal Home Loan Banks of San Francisco, Portland and Los Angeles, were organized and exist, and the ownership of the over $120,000,000.00 of their assets, involved in this litigation.

(2) **The Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C. 1461, et seq.,** under which appellee Long Beach Federal Savings and Loan Association was organized and exists, and upon the application, interpretation and effect of which ownership, of its more than $25,000,000.00 in assets involved in this litigation, is to be determined.

(3) **The National Housing Act, 48 Stat. 1246, 12 U. S. C. 1724, et seq.,** under which defendant Federal Savings and Loan Insurance Corporation was organized and exists, and upon the application, interpretation, and effect of which its liabilities in said litigation, alleged to exceed $20,000,000.00, are to be determined.

Some of the other Federal enactments, the validity and construction of which are placed in issue by the pleadings, are:

(a) The First War Powers Act of 1941 (55 Stat. 838, 50 U. S. C. App. 601) and Executive Order No. 9070 thereunder;

(b) Reorganization Act of 1945 (59 Stat. 613, 5 U. S. C. 133y, etc.); and

(c) Rules, Regulations, Directives and Orders, claimed to have been adopted pursuant to the authority of said Acts and many others.

The jurisdictional paragraphs of the various complaints, cross-claims, third-party complaints, and other pleadings, contain references to many additional Acts of Congress, sections of the United States Constitution, Regulations, purportedly adopted under one or more of said Acts of Congress, and other sources of federal questions.

Further complete treatment of the subject of jurisdiction will be found in the "Brief for Appellees-Plaintiffs (Shareholders Protective Committee)," pages 37 to 70, and in the "Brief for Appellee Long Beach Federal Savings and Loan Association," pages 77 to 122, in Appeal No. 12511.

The appellants claim that the Circuit Court of Appeals has jurisdiction under 28 U. S. C. 1291.

STATEMENT OF THE CASE.

INTRODUCTION.

This statement of the case is intended to cover only the subjects relating to attorneys' fees. A more comprehensive statement of the entire case is already before this Honorable Court:

(1) "Statement of the Case," pages 12 to 54 of the brief for Appellee Long Beach Federal Savings and Loan Association;

(2) "Description of the Litigation" and "Statement of Facts," pages 10 to 19 of the Brief for Appellee plaintiffs (Shareholders Protective Committee), both in Appeal No. 12511; and

(3) "The Facts" summarized, pages 19 to 44 in Plaintiffs Opposition to Stay of Payment of Attorneys' Fees, etc., in this Appeal No. 12591.

Appellants have insisted throughout the seventeen[3] different appellate and other court proceedings that none of their seizures or confiscations were subject to court review under any circumstances.

Appellants have also insisted that appellees could not use any part of appellees' own property or assets for the payment of attorneys' fees for court action against appellants.

In none of the seventeen appellate and other court proceedings have either of these contentions of appellants been upheld.

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[3]Of the 17 appeals, writs, etc., 15 have been taken or commenced by appellants. Only the two original class actions filed in 1946 were commenced by appellees.

In the United States Supreme Court in 1946-1947, and in this Honorable Court of Appeals in 1947-1948, appellants sought writs, stays, and other obstructions to the payment of attorneys' fees then allowed by the District Court to attorneys for plaintiffs in one of the class actions, (No. 5421-PH). The writs and stays were denied by both the United States Supreme Court[4] and by this Honorable Court of Appeals,[5] and thereafter the attorneys' fees allowed by the District Court were paid from the assets in the registry of the Court.

Appellants immediately abandoned, not only their attempts to block payment of attorneys' fees, but within six weeks thereafter, appellants confessed judgment in the District Court, removed the conservator previously appointed for the Long Beach Association, returned the Association and the remnants of its assets to the founding management, and ordered the removed conservator to account with the court below for his dealings with the seized $26,000,000.00 in assets.

The Los Angeles Bank has not yet been restored, but if appellants follow in the *Los Angeles Bank* case, the pattern which they followed in the *Long Beach* case, decision of this attorneys' fee appeal may well decide the fate of the Los Angeles Bank.

In allowing attorneys' fees on account to attorneys for the plaintiffs in class Action No. 5678-PH, who are seeking return of the seized Los Angeles Bank, the District Court, after full hearings, made twenty-one (21) "Find-

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[4]*Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041.

[5]Appeal No. 11751, C. C. A. 9, Stay Denied, Appeal Dismissed February 6, 1948.

ings,"[6] and eleven (11) conclusions of law, of which appellants specifically challenge on this appeal, only Findings Nos. 14, 15, 16, 17, 18 and 21, but they do not point out any insufficiency of the evidence to sustain the findings.[7]

Appellants also claim the Court is without jurisdiction and generally challenge all findings to the contrary.[8]

Appellants applied both to the District Court and to this Honorable Court of Appeals for a stay of payment of the attorneys' fees attacked on this appeal. Both the District Court and this Court of Appeals denied such stay. The District Court in its order denying the stay likewise made findings of fact, which are printed in the appendix as Exhibit A, pages 1 to 3.

The Trial Court's findings were made after more than 100 hearings in the more than five years of litigation before this same trial judge.

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[6]"Findings of Fact, Conclusions of Law, and Order re Allowance of Attorneys' Fees on Account," here appealed from. [Apl. No. 12591, R. 288.]

[7]Appellants present no argument to support this claim of error. "Therefore we need not consider the point." (*Wingate v. Bercut,* 146 F. 2d 725 (C. C. A. 9—1941); *Goldstein v. Polakoff, et al.,* 135 F. 2d 45 (C. C. A. 9—1943); *Wittmayer v. U. S.,* 118 F. 2d 808 (C. C. A. 9—1941.)

[8]"Findings of Fact shall not be set aside unless clearly erroneous . . ." Rule 52(a), F. R. C. P., which applies to appeals by the government as well as to those by other litigants. (*United States v. Yellow Cab Company,* 338 U. S. 338, 94 L. Ed. 150 (1949).)

STATEMENT OF THE CASE.

FROM ADMITTED OR FINAL FINDINGS OF FACT.

1. Seizure of the Los Angeles Bank:

"That on or about the 29th day of March, 1946, the Federal Home Loan Bank[9] of Los Angeles had assets of approximately $46,000,000.00, was entirely solvent, and had a surplus of approximately $1,900,000.00. That the business, property and assets of said Los Angeles Bank as well as the property and assets of its shareholder and member Associations then in the possession of the Los Angeles Bank either as pledgee, depositary, custodian, trustee or bailee, or otherwise, were, on or about March 29th, 1946, and without notice, hearing or trial, seized among others by defendants Fahey and Ammann and purportedly on said date of March 29th, 1946, the said Los Angeles Bank was by said defendants, liquidated, consolidated, merged and dissolved. That the defendant and cross-defendant Federal Home Loan Bank of San Francisco and/or Federal Home Loan Bank of Portland, on said date, and acting in concert with Fahey, Ammann and other defendants and cross-defendants, received and took possession and control of said assets herein referred to and which at the time of said seizure, were in possession of the Federal Home Loan Bank of Los Angeles. That after said seizure, the said San Francisco and/or Portland

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[9]The Los Angeles Bank was founded in 1932 with an initial capital of $10,000,000.00. In 12 years it had grown to $46,000,000.00. [Apl. No. 12511, R. 4559, 6454.] It was completely solvent, prosperous, and growing. It had never been accused of any misconduct or wrongdoing whatsoever. It had been examined by appellants on March 15, 1946, just two weeks prior to its seizure. The examination report contained no criticism nor did it direct correction of any matters.

Bank has ever since been in possession of said assets and since said date the plaintiff Los Angeles Bank, as such, has had no property or assets in its actual possession or under its actual control with which to employ counsel. That on said date said assets were purportedly transferred by certain defendants to said Portland Bank without any consideration to the Los Angeles Bank or any of its member stockholders and without any resolution by the Portland Bank requesting permission to acquire any assets of the Los Angeles Bank and without any resolution or request of the Portland Bank to assume any of the liabilities of the Los Angeles Bank. That simultaneously with said seizure the name of said Portland Bank was purportedly changed to Federal Home Loan Bank of San Francisco by the Federal Home Loan Bank administration."[10] [Apl. No. 12591, R. 293-294.]

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[10]"SUE AND BE SUED"—Federal Home Loan Bank Act, 12 U. S. C. A. 1421, at 1432, provides that the home loan banks (of San Francisco and/or Portland and/or Los Angeles, whichever exists) is a "body corporate" having capital stock "divided into shares of a par value of $100 each." Said banks are given general broad corporate powers such as the power to "use a corporate seal, to make contracts . . . TO SUE AND BE SUED, TO COMPLAIN AND TO DEFEND IN ANY COURT. . . ."

The Los Angeles Bank was substantially private owned, having 172 stockholder associations, owning $5,971,500.00 of its voting capital stock. It had its main and only office in Los Angeles, where it was engaged in the banking business in California. None of the officers, directors, or stockholders of the Los Angeles Bank ever consented to its seizure or dissolution.

The assumption of the liabilities and assets of the Los Angeles Bank was not consented to, nor approved by the directors or stockholders of the Federal Home Loan Bank of Portland. [Exhibits 5, 6a, 6b, Minutes, Executive Committee, Federal Home Loan Bank of San Francisco, September 15, 1948, Clk. Tr. 14448-14499], and was repudiated by resolution of the stockholders, July 28, 1947 [Minutes, Stockholders Meeting—Apl. No. 12511, R. 3075].

2. Seizure of the Solvent Long Beach Association:

"The Federal Home Loan Administration on May 20, 1946, without notice or hearing, appointed Ammann conservator for the Association and he at once entered into possession." (*Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030-1—1947.)

"That there is involved in this litigation the approximately $26,000,000.00 of assets of the Long Beach Federal Savings and Loan Association which includes its approximately $1,300,000.00 surplus when seized on May 20, 1946; and the approximately $46,000,000.00 of assets, including its $1,900,000.00 of surplus of the Federal Home Loan Bank of Los Angeles when it was seized on March 29, 1946; and the approximately $9,000,000.00 of assets of the Federal Home Loan Bank of Portland and the assets of the combined Federal Home Loan Banks of Los Angeles and Portland, subsequently known as the Federal Home Loan Bank of San Francisco now allegedly amounting to approximately $119,000,000.00. That the combined assets without duplication involved in this litigation amount to approximately $145,000,000.00." [Apl. No. 12511, R. 6454.]

3. Class Actions Commenced May 27, 1946:

"That the above-entitled actions were filed and since have been maintained and prosecuted as Class actions; 5421-PH being originally filed on behalf of approximately 16,000 shareholder depositors of the Long Beach Federal Savings and Loan Association, and 5678-PH filed for all of the groups of Federal Savings and Loan Associations, State Building and Loan Associations and other financial institutions,

all members and stockholders of plaintiff Federal Home Loan Bank of Los Angeles." [Apl. No. 12591, R. 292-293.]

4. Actions Consolidated November 7, 1947:

"That the above actions, entitled Mallonee, et al. vs. Fahey, *et al.,* No. 5421-PH, and Los Angeles Bank, *et al.,* vs. San Francisco Bank, *et al.,* No. 5678-PH(WM) have heretofore been ordered consolidated for all purposes."[11] [Apl. No. 12591, R. 291.]

5. Good Faith and Reasonable Grounds:

"That said actions were and each of them was commenced and at all times since have been and now are being prosecuted and maintained by the plaintiffs therein, and each of them, through their respective counsel of record, in good faith and on reasonable grounds. . . ." [Apl. No. 12591, R. 291-292.]

6. Congressional Committee Recommendations—1946:

". . That evidence of said good faith and reasonable grounds is illustrated by, but not limited to, the

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[11]The appellants Home Bank Board reached the same conclusion. Chairman William K. Divers, by letter dated October 21, 1949, advised the Attorney General that:

"The Board is now satisfied that the bank litigation is so intertwined with the Long Beach case that a separate settlement is impossible during the pending litigation." [Apl. No. 12511, R. 10882.]

findings, conclusions and recommendations[12] of the Special Committee Report of the United States Congress filed as an exhibit in the proceedings had upon the motion for attorneys' fees by the plaintiffs in said Action No. 5678-PH." [Apl. No. 12591, R. 292.]

7. INTERPLEADER—$14,000,000.00 IN COURT:

"That in these actions[13] in which have heretofore been filed numerous and sundry cross-claims, interventions, third-party pleadings, motions and petitions and other matters in interpleader or in the nature of

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[12]The Congress of the United States caused an investigation of these confiscations to be made by the "Select Committee to Investigate Executive Agencies." After extensive hearings the Committee on July 25, 1946, recommended:

"(1) That the commissioner revoke the order reducing the number of districts from 12 to 11 in the Federal Home Loan Bank System.

"(2) That the commissioner take all necessary steps to reestablish a Federal Home Loan Bank of Los Angeles and a Federal Home Loan Bank of Portland, and revoke the order or orders by which the assets of these two district banks were intermingled."

(Page 27—House Report No. 2659, July 25, 1946, Tenth Intermediate Report of the Select Committee to Investigate Executive agencies—Investigation of Federal Home Loan Bank Administration-Federal Home Loan Bank of Los Angeles-Long Beach Federal Savings and Loan Association.) [Apl. No. 12511, R. 9107 to 9192 at 9173.]

[13]The $14,000,000.00 was interplead into court in order to clear the titles of several thousand homes, clouded by the seizure and wholesale transfers and assignments of the seized assets.

The Los Angeles Bank, First Federal Savings and Loan Association, *et al.,* are plaintiffs in 5678-PH (below), and cross-claimants in 5421-PH (below). The appellees O'Melveny & Myers and Richard FitzPatrick, since August 22, 1946 [R. 564 in Apl. No. 12511], and W. I. Gilbert, Jr., since September 12, 1949 [Apl. No. 12511, R. 7191], have participated in these proceedings on their behalf and for their benefit, as said Appellees' respective attorneys of record.

the interpleader pursuant to which and under proceedings and hearings thereon, after notice duly given, there has been deposited in this court assets amounting to approximately $14,000,000.00 which now remain in the registry of this court waiting disposition by further order, proceeding or adjudication of this court and which cannot be disposed of without order of this court. That said assets in the registry of this court are adequate to cover the allowance of attorneys' fees hereinafter made, without the requirement of the deposit of additional money or property." [Apl. No. 12591, R. 294.]

8. Clouded Titles—Cleared:

"The Federal Home Loan Bank of Los Angeles claims that its assets were illegally, unconstitutionally, and unlawfully, taken from its possession under said Orders Nos. 5082, 5083 and 5084, and were used totally or in part by the said Federal Home Loan Bank of San Francisco to make the advancements of cash made by said bank to defendant A. V. Ammann, evidenced by said four (4) notes, Exhibits 'F,' 'G,' and 'H,' and 'I,' in the said Noon Affidavit, totaling $6,300,000.00 and that as a result thereof, the said San Francisco Bank holds said four (4) notes and any and all rights thereunder as a trustee of a constructive trust in favor of said Los Angeles Bank and that it, the said Los Angeles Bank, has a right to trace its assets into said notes, and into the claims arising therefrom against the collateral and other property of Long Beach Federal Savings and Loan Association, and against the Long Beach Federal Savings and Loan Association itself." [Apl. No. 12511, R. 8404-8405.]

"That in the transactions between the said defendants A. V. Ammann, purportedly acting as conservator for said Long Beach Federal Savings and Loan Association, and the defendant Federal Home Loan Bank of Portland, sometimes also known as the Federal Home Loan Bank of San Francisco, the said defendant A. V. Ammann, by written assignments on separate documents describing said thoussands of deeds of trust, and by assignments upon the backs of each of the original notes therein concerned attempted to assign and transfer or pledge said thousands of notes and deeds of trust securing the same in which Long Beach Federal Savings and Loan Association was named as beneficiary." [Apl. No. 12511, R. 8408.]

"That pending final judgment and decision of the various issues of the within consolidated actions neither said Long Beach Federal Savings and Loan Association, alone, nor said Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, alone, nor said Federal Home Loan Bank of Los Angeles, alone, nor any of the parties to this action can, without the aid and assistance of this court, make, execute and deliver to the said borrowers and homeowners an effective release, reconveyance and discharge of their real property." [Apl. No. 12511, R. 8409.]

"That whatever ultimate right any of said present or future parties claimant may have to the proceeds of the said four (4) notes of $6,300,000.00 face amount, are preserved by the deposit in court as herein required. That whatever injury may result by said deposit to any of the contending parties is so slight as to be heavily outweighed by the equitable considerations of the injuries which flow and which will continue to flow to the borrowers and purchasers

of properties conveyed by said deeds of trust, if said deposit were not so ordered. That among the injuries which would flow to said homeowners, and borrowers and purchasers by failing to require such deposit pending the final judgment in the within action, are (1) the inability of said thousands of borrowers and homeowners to secure a merchantable, or insurable title to the particular real property involved, which in turn would prevent either a sale thereof, or a loan or refinancing thereon, or a payment and termination of the interest and obligations of the present loans and deeds of trust thereon, and (2) a multiplicity of suits which might involve all of the issues raised, or which can be raised, in the instant litigation, and all of the parties to the present litigation; which injuries and damage are found to be grave, irreparable and continuing as to the thousands of borrowers and homeowners who have given their notes and deeds of trust to said Long Beach Federal Savings and Loan Association and conveyed the titles to their homes as security for said loans." [Apl. No. 12511, R. 8410-8411.]

"That if such payment by said Long Beach Federal Savings and Loan Association of said sum to be made to one of said conflicting claimants to the exclusion of the other, and the other claimant thereafter would be held to have been entitled to such payment, then the owners of the various properties under trust deeds may each be subjected to claims upon their notes and property for a portion of such total liability, which possible liability exists as a cloud upon the title to each of the thousands of properties involved and prevents each of them from securing a merchantable and insurable title, unless the within Order is made. That the making of the within Order thus avoids the complex, multiple and conflicting

claims and demands which may be made upon the approximately 8,000 individual borrowers of said Association." [Apl. No. 12511, R. 8412.]

9. INTIMIDATION:

"That there is evidence that certain defendants herein have by intimidation, sought to prevent and preclude plaintiffs herein and Associations of the class represented by them from obtaining the advice or services of counsel to protect the interests of said Association or to represent them in court. That said intimidation has ben evidenced by apparent threats of seizure if such Associations spent or appropriated funds for legal expenses or attorney fees in that the record discloses that on March 15, 1946, the Los Angeles Bank, by resolution, appropriated funds for legal expenses and attorney fees in connection with the investigation by the Sub Committee of the United States Congress and that defendant John H. Fahey was advised of such resolution on or about March 18, 1946, and that thereafter to wit, on or about March 29, 1946, said Los Angeles Bank was seized in the manner hereinbefore specified. That subsequent to the seizure of the Los Angeles Bank and prior to seizure of the Long Beach Federal Savings and Loan Association spot checks of the various Associations were made at the instigation of certain defendants herein for the purpose of ascertaining whether or not other Associations were making appropriations for the same purposes. That on May 8, 1946, the Long Beach Federal Savings and Loan Association appropriated funds by resolution for the purpose of employing counsel to conduct appropriate legal proceedings to restrain the Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of the affairs

of the said Long Beach Federal Savings and Loan Association, and that on May 20, 1946, the assets of the said Long Beach Federal Savings and Loan Association were seized without notice or hearing by, among others, the same defendants who seized the Los Angeles Bank. That in December, 1949, certain officers of plaintiff First Federal Savings and Loan Association were approached by representatives of certain defendants for the purpose of ascertaining whether or not the said Association had appropriated funds to pay its attorney in connection with the above proceedings. That said acts and conduct as herein described furnished and furnish reasonable ground for the plaintiffs in Action 5678-PH and the Associations represented by them to believe that if said Associations or any of them appropriated, or now appropriates, or uses their funds for purposes of defraying legal expenses or counsel fees that they might have been, or may likewise be, seized in the manner that the said Los Angeles Bank and Federal Savings and Loan Association of Long Beach were seized." [Apl. No. 12591, R. 295-297.]

10. Denial of Counsel Is Denial of Due Process:

"The within litigation has been pending since May 27th, 1946; it is of an extremely complex nature; all parties to the within proceeding on the allowance of attorneys' fees have proceeded with diligence and good faith to bring the multiple claims among the numerous parties in the actions in chief to issue; at least since May 10, 1949, if not from the inception of the litigation, all parties have proceeded on the basis that no fees would be collected by counsel in whose favor the above order runs except upon court order, after adversary proceedings; the matter of the entire litigation is proceeding in one phase or

another almost daily and requires the constant attention of counsel; the objections to the payment of the fees directed to be paid by the above order, were based entirely on matters of law which have heretofore been repeatedly urged upon and repeatedly rejected by this court and have been set forth in various findings, orders and judgments, reference to which is hereby made, from which judgments and orders either no appeal was taken, or the time for appeal has long since expired, or in some instances appeals were taken and later dismissed.

"In view of the foregoing it appears that it would be an abuse of discretion and a denial of the right to counsel, to grant a stay of the above order, and the same is denied, . . ."[14]

11. Attorneys' Fees to Be Judicially Determined as U. S. Attorney Agreed:

". . . That Attorney Peyton Ford, the Assistant to the Attorney General of the United States, as attorney for defendants, Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann and Federal Savings and Loan Insurance Corporation, on behalf of cer-

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[14]On June 19, 1950, U. S. District Court denied stay of payment of these attorneys' fees, except stayed for 10 days to enable appellants to apply to this U. S. Court of Appeals for the 9th Circuit, for a stay. (Designated by appellee Gilbert, but not printed, see Appendix pp. 1 to 3.) Stay denied, September 5, 1950, in this appeal No. 12591, C. C. A. 9.

Also see similar Findings Nos. 11 and 12 in Order Denying Stay of Payment of plaintiffs' costs and attorneys' fees from funds in the registry, *Mallonee v. Fahey,* No. 5421-PH, September 30, 1947 [Apl. No. 12511, R. 2464-78]. Stay denied, C. C. A. 9, December 8, 1947 [Apl. No. 12511, R. 2959-60], and Appeal No. 11751 dismissed February 6, 1948 [Apl. No. 12511, R. 3549-52].

tain defendants wrote and caused to be filed in the record a certain letter and which said letter was relied upon by counsel and the court, and which stated, in part, as follows:

> '(1) The attorneys' fees, whether interim or final, shall be judicially determined in an adversary proceeding and the stipulation dated March 22, 1949, and the subsequent award of April 1, 1949, be vacated, or
>
> '(2) Following the suggestion of the court, one-third of the amount awarded by the court in its decision of April 1st shall be paid now on proper order of the court (less the deduction of $50,000 previously paid, as provided in presently proposed order), regardless of the outcome of negotiations for settlement; the said stipulation and award shall be vacated and any further attorneys' fees shall be judicially determined in an adversary proceeding at the conclusion of negotiations for settlement, if agreement thereon be reached, or in the litigation, if such there be, or .. .'

"That said letter was dated April 27, 1949, and was written by Attorney Peyton Ford, Assistant to the Attorney General of the United States, as attorney for the above-listed Defendants in connection with the request that counsel for the plaintiffs, Mallonee, *et al.,* and counsel for the Long Beach Federal Savings and Loan Association, and counsel for the Title Service Company and counsel for Robert H. Wallis, stipulate and agree that the Court's announced order fixing an amount of approximately $540,000.00 as an allowance on account of attorneys' fees on account of services rendered, be vacated and set aside and that a new and different allowance on account in the

amount of only approximately one-third thereof be ordered and entered at said time.

"That a true and correct copy of said letter was ordered filed in the within proceedings by Order of this Court duly made and entered May 10, 1949. That this Court and the parties and all of them, relied upon said letter of said Attorney Peyton Ford, Assistant to the Attorney General of the United States, dated April 27, 1949.

"That in reliance upon said representations in the said letter dated April 27, 1949, and signed by Attorney Peyton Ford, Assistant to the Attorney General of the United States, as attorney for Defendants Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann, and Federal Savings and Loan Insurance Corporation, the said parties did so stipulate to the vacating of said priorly announced attorneys' fee order, and in reliance thereon this Court did make and duly enter its Findings of Fact, Conclusions of Law and Order for Interim Allowances on Account of Attorneys' Fees, prior to December 15, 1948, which Order was duly made and entered May 10, 1949, and which said Order and Jugdment has now become final.[15] . . ." [Apl. No. 12591, R. 297-300.]

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[15]Right of Appeal was waived by appellants [R. 6542 in Apl. No. 12511] from said appealable "Order for Interim Allowance on Account of Attorneys' Fees . . ." [R. 6527 in Apl. No. 12511]. Payment of approximately two-thirds of said previously judicially determined allowance on account of attorneys' fees was withheld in reliance upon the Peyton Ford letter.

Said withheld two-thirds attorneys' fees have not been paid, although the settlement negotiations pledged by Assistant Attorney General, Peyton Ford [Apl. No. 12511, R. 10744] have been repudiated by the Department of Justice and the Appellant Home Loan Bank Board. [Letter dated October 21, 1949, Apl. No. 12511, R. 10882.]

12. FUNDS OF ASSOCIATIONS ON DEPOSIT EXCEED ATTORNEYS' FEES:

"That the San Francisco Bank has in its possession, or in the registry of the court, funds of many Savings and Loan Associations, members of the class or classes represented by the Association plaintiffs, which said funds will include funds merely on deposit in said San Francisco Bank, and not held by said San Francisco Bank as collateral. That said funds herein described are substantially in excess of the allowance of attorneys' fees hereinafter made." [Apl. No. 12591, R. 295.]

13. $100,000.00 LOS ANGELES BANK ASSETS USED BY SAN FRANCISCO BANK TO PAY ITS ATTORNEYS:

"That a portion of the books and records of San Francisco Bank reveal that out of the funds in the possession of the San Francisco and/or Portland Bank hereinbefore described and which funds consisted of assets of the Los Angeles Bank co-mingled with funds of the Portland Bank, the said San Francisco Bank has paid, for the purpose of resisting plaintiffs' claims, the sum of approximately $100,000.00 to defray legal expenses and attorney fees in addition to indirect or other expenses not presently known."[16] [Apl. No. 12591, R. 297.]

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[16]Court approval has not been obtained for the payment of any of the San Francisco Bank expenses nor attorneys' fees.

The owners of 69% of the total votable outstanding shares of stock of the purported Federal Home Loan Bank of San Francisco have voted in writng "Against further use of Los Angeles Bank assets by the San Francisco Bank to litigate against Los Angeles Bank" while only 3.7% voted in favor.

Likewise 68% of the owners of said stock have voted "in favor of dissolution of said San Francisco Bank" and only 4.6% against [Apl. No. 12591, R. 695].

14. No Objection by Any Stockholder to Payment of Los Angeles Bank's Attorneys' Fees:

"That although due notice[17] was given to each Association and person who could possibly be interested in the disposition of any money, either in court or in the hands of the San Francisco Bank, no person or Association so notified, or otherwise, has appeared to enter or make any objection or protest concerning the disposition of such funds, save and except those actually present in court through their counsel to wit: San Francisco Bank, Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann, and Federal Savings and Loan Insurance Corporation." [Apl. No. 12511, R. 291.]

SUMMARY OF FACTS.

(1) The Los Angeles Bank was denuded of funds with which to hire counsel. The summary seizure by the appellants of all of its $46,000,000.00 of assets, and their commingling them with the $9,000,00.00 of assets of the Portland Bank, gave the San Francisco Bank its assets of $55,000,000.00 (then).

(2) The Stockholder member associations of the Los Angeles Bank were intimated by fear of being seized by appellants from appropriating other funds to hire counsel to recover their bank and its seized assets (admitted finding 10).

(3) Approximately 5/6ths of the combined assets will be equitably annulled by these stockholders of the Los

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[17]Notice of hearing of motion to allow attorneys' fees was given by publication and service by registered mail upon all stockholders of the Los Angeles, Portland and San Francisco Banks as per the court's order [Apl. No. 12511, R. 8920].

Angeles Bank as a class as stockholders in whichever Bank or Banks are ultimately determined to exist; otherwise the seizure was a theft.

(4) Whatever part of the $14,000,000.00 in court is ultimately determined to be owned by the said Banks, at least 5/6ths of their aggregate interests will be owned equitably by the Los Angeles Bank Stockholders, as a class.

(5) To enable the Los Angeles Bank and its stockholders to be represented by counsel in this litigation, being prosecuted in good faith and upon reasonable grounds to recover their Bank and its assets, the District Court has allowed fees to their attorneys of approximately 1/7ths of 1% of their seized assets, payable from funds recaptured and now on deposit in the registry of the court. Only the seizing appellants object.

QUESTIONS PRESENTED.

These appellees disagree with the questions presented on pages 15 to 17 of appellants' opening brief; particularly, appellants' questions Nos. 1 to 5 which go to the merits of the case and are not decisive of the right to attorneys' fees. Decision of this appeal does not require a decision of the case on the merits before trial, although reversal might have that effect. The attorneys' fees appealed from were allowed by the Court below, for the purpose of a trial on the merits and a full hearing into constitutionality, statutory validity and fraud in the seizures by appellants.

Appellants seized without notice, hearing or trial and, for five years, have obstructed and prevented a hearing by

the Court below on the merits of the Los Angeles Bank seizure and confiscation. They seek by this appeal to evade such a trial on the merits by preventing counsel for appellees being enabled to try the action. Appellees believe the questions presented by this appeal are the following:

I.
DUE PROCESS AND RIGHT OF COUNSEL.

WHETHER THE RIGHT TO COUNSEL AND DUE PROCESS OF LAW CAN BE CUT OFF BY SUMMARY SEIZURE AND CONFISCATION OF ALL OF THE ASSETS OF THE SOLVENT $46,000,000.00 FEDERAL HOME LOAN BANK OF LOS ANGELES.

II.
INTIMIDATION.

WHETHER APPELLANTS, BY THREATENING SEIZURE AND CONFISCATION OF SAVINGS ASSOCIATIONS (APPELLEES), CAN PREVENT PAYMENT OF COUNSEL AND THEREBY ESCAPE A COURT HEARING ON THE MERITS OF APPELLANTS' PREVIOUS SEIZURES AND CONFISCATIONS.

III.
INEQUITABLE USE OF SEIZED ASSETS.

WHETHER APPELLANTS SEIZING $46,000,000.00 (THE ENTIRE ASSETS AND PROPERTY) OF THE LOS ANGELES BANK CAN USE IN EXCESS OF $100,000.00 THEREOF FOR APPELLANTS' ATTORNEYS TO RESIST JUDICIAL DETERMINATION OF THE VALIDITY OF THE SEIZURE AND AT THE SAME TIME DENY TO THE STOCKHOLDERS, OWNERS OF THE SEIZED ASSETS, A $75,000.00 ALLOWANCE ON ACCOUNT OF ATTORNEYS' FEES FOR PROSECUTING THIS "CLASS ACTION IN GOOD FAITH AND ON REASONABLE GROUNDS" FOR THE RECOVERY OF SUCH SEIZED ASSETS.

IV.

CAN APPELLANTS REPEAL CONGRESSIONALLY-GRANTED RIGHT TO DEFEND.

WHETHER THE RIGHT TO "SUE OR BE SUED, COMPLAIN AND DEFEND . . ." EXPRESSLY GRANTED TO APPELLEE LOS ANGELES BANK BY CONGRESS (12 U. S. C. A. 1432) CAN BE CUT OFF BY PURPORTED INSTANTANEOUS SEIZURE, LIQUIDATION, CONSOLIDATION AND MERGER OF THE LOS ANGELES BANK BY APPELLANTS.

V.

COURT'S POWER TO ALLOW ATTORNEYS' FEES IN INTERPLEADER.

WHETHER A UNITED STATES COURT IN WHOSE CUSTODY $14,000,000.00 OF ASSETS HAVE BEEN DEPOSITED IN INTERPLEADER CAN ALLOW $75,000.00 (OR APPROXIMATELY 1/7TH OF 1%), AS ATTORNEYS' FEES, TO CLAIMANTS TO SUCH ASSETS FOUND BY THE COURT BELOW TO BE "PROSECUTING CLASS ACTIONS . . . IN GOOD FAITH AND ON REASONABLE GROUNDS" FOR THE RECOVERY OF SUCH INTERPLEAD AND OTHER ASSETS AGGREGATING OVER $46,000,000.00.

SUMMARY OF ARGUMENT.

The interim allowances of attorneys' fees appealed from should be affirmed because:

I.

Denial of counsel is denial of due process.

Denial of counsel is unconstitutional whether caused by physically excluding counsel from the court room or caused by intimidation or by preventing compensation of counsel and thereby denying counsel.

II.

Jurisdiction of the Court to allow attorneys' fees and jurisdiction over the parties and subject matter generally, is *res judicata,* final, and conclusive.

Appellants, by writs which were denied, and by appeals which were dismissed, have established, as the law of this case, the jurisdiction of the Court over appellants and over the subject matter in general, and specifically to allow attorneys' fees.

III.

The Court has jurisdiction in interpleader and otherwise over the approximately $14,000,000.00 of assets in the Registry of the Court and can allow attorneys' fees therefrom.

The Court has jurisdiction to allow attorneys' fees from funds protected in class actions by stockholders of the seized corporations.

The Court can correct the inequities of appelllants' using $100,000.00 of the seized assets to prevent a trial on the merits of the seizures, by allowing to plaintiffs appropriate interim attorneys' fees from the seized assets in the Registry of the Court.

Assets, brought within the protective custody of the Court, either into the hands of a receiver or into the Registry of the Court, are protected or recovered for the benefit of all of the class beneficially entitled to ownership of such assets.

The Court into whose custody such assets are brought can allow counsel for plaintiffs their attorneys' fees from such assets.

The Court has jurisdiction to allow attorneys' fees to enable the Court to hear the case on the merits.

Certain phases of this litigation will require a determination of the case on the merits before a final determination can be made as to the jurisdiction of the Court.

IV.

A. Plaintiffs have standing to sue for recovery of assets physically within the territory of the Court and unconstitutionally or illegally seized by appellants.

Appellants' seizure, without notice, hearing or trial of the solvent, prosperous, and growing $46,000,000.00 Los Angeles Bank was made without due, or any, process of law and is subject to judicial review in *in rem* actions to quiet title to, and recover possession of, the unconstitutionally and illegally seized and confiscated assets.

B. Appellants are not immune from suit because they commit their confiscations under the cloak of their official position. The actions, unconstitutional, beyond statutory authority, arbitrary, fraudulent, and malicious, are individual torts of the defendants and are not the acts of the United States.

C. The Administrative Procedure Act applies to all of appellants' orders, which are all reviewable.

D. There are no indispensable parties. No concurrence or action on the part of appellants is required for the payment of attorneys' fees, here appealed from. The Court below, after notice to appellants, has made his order upon his own clerk, to pay the money from the Registry of the Court. No action by appellants is necessary to effectuate the order nor can their non-consent prevent its enforcement.

E. The suit is not against the United States. The United States is not named as a party nor can appellants

hide their wrongdoings and torts behind the immunity of the United States because they may hold official positions. Their actions are unconstitutional, beyond statutory authority, and therefore void, and cannot be the acts of the United States.

V.

The Court's power to make interim allowances of attorneys' fees from assets in the protective custody of the Court in its Registry is not postponed until final termination of the litigation.

The Court can allow attorneys' fees to beneficiaries, suing or defending, to protect a trust, regardless of the outcome of the litigation, as long as the beneficiaries act "in good faith and upon reasonable grounds." The Court has found appellees are so acting and appellants do not attack that finding.

The assets are recovered at the moment they come into the protective custody of the Court, and allowances from such recovered assets can be made to the attorneys active in, or responsible for, such recovery.

It is not necessary to await final distribution of the funds from the protective custody of the Court in order to allow interim attorneys' fees on account, as compensation for the protection of the assets, achieved when taken into the custody of the Court.

VI.

This Honorable Court of Appeals should not attempt to decide the merits of this litigation before full trial and hearing in the Court below. A collateral appeal from an interim allowance of attorneys' fees is not a method to review, in advance of trial, what the trial court has not yet decided.

ARGUMENT.

I.

DENIAL OF COUNSEL IS DENIAL OF DUE PROCESS.

The right to counsel is a fundamental equal in rank to the right to notice and to hearing. Denial of counsel can occur just as effectively in litigation of this magnitude by confiscation of all assets of a party, as by excluding counsel from the court room.

The undisputed findings of the court show intimidation by appellants in an effort to prevent appellees having counsel to defend themselves from summary liquidation and confiscation. The frenzied resistance of these same appellants to every effort of counsel for the 16,000 depositors in the Long Beach Association for an award of compensation to prosecute the litigation, coupled with appellants' abandonment of the entire case immediately upon allowances of interim fees to counsel for such plaintiffs, is shocking. But when coupled with appellants' use of $100,000.00 of the seized assets for their own attorneys to prevent a trial on the merits before the court below, the procedure becomes unconscionable.

In considering denial of counsel as denial of due process, the California District Court of Appeals, in:

> *Prudential Ins. Co. v. Small Claims Court,* 173 P. 2d 38, 76 Cal. App. 2d 379 (1946) (hearing denied, California Supreme Court)

said:

> ". . . in both civil and criminal cases the right to a hearing includes the right to appear by counsel, and that the arbitrary refusal of such right constitutes a deprivation of due process. (Roberts v. Anderson, 10 Cr., 66 F. 2d 874; Powell v. State of

Alabama, 287 U. S. 45 [53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527]; Cooke v. United States, 267 U. S. 517 [45 S. Ct. 390, 69 L. Ed. 767]; Steen v. Board of Civil Service Commrs., 26 Cal. 2d 716 [160 P. 2d 816] . . .)"

In *Steen v. Board of Civil Service Com'rs,* 160 P. 2d 816, 26 Cal. 2d 716 (1945), the California Supreme Court said:

". . . Here the board effectually denied petitioner the oportunity of making an objection by arbitrarily refusing to allow petitioner's counsel to participate in the proceeding. This was a denial of a hearing . . ."

In *Roberts v. Anderson,* 66 F. 2d 874 (1933), the U. S. Court of Appeals for the Tenth Circuit said at page 876:

"(7) The right to a hearing includes the right to the assistance of counsel of his own choice, if requested . . ."

Further at page 877:

"The right to be represented by counsel is a substantial one, and means what it says. It does not mean that chosen counsel shall appear by permission of, or insubordination to, counsel appointed without warrant of law . . ."

In *Powell v. Alabama,* 287 U. S. 45, 77 L. Ed. 158 (1932), the U. S. Supreme Court said at page 68:

". . . the right to the aid of counsel is of this fundamental character.

"It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, . . . constitute basic elements of the constitutional requirement of due process of law . . .

"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . If in any case, CIVIL or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

In the light of these decisions, let us consider the finding of the court below as to "due process."

"The within litigation has been pending since May 27th, 1946; it is of an extremely complex nature; all parties to the within proceeding on the allowances of attorneys' fees have proceeded with diligence and good faith . . . the matter of the entire litigation is proceeding in one phase or another almost daily and requires the constant attention of counsel; . . .

"In view of the foregoing it appears that it would be an abuse of discretion and a denial of the right to counsel, to grant a stay of the above order, and the same is denied, . . ."[18] (Appendix pp. 1 to 2.)

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[18]Such finding was contained in the order of the District Court denying stay of the order for payment of attorneys' fees, involved in this appeal No. 12591. A ten-day stay was, however, granted to enable appellants to apply to this Honorable Court of Appeals for a stay of the District Court's order for payment of attorneys' fees on account.

This Honorable Court of Appeals, on the 5th day of September, 1950, likewise denied a stay of the District Court's order for payment of attorneys' fees on account.

II.

A. JURISDICTION OF THE COURT TO ALLOW ATTORNEYS' FEES, AND OVER THE PARTIES AND SUBJECT MATTER GENERALLY, IS RES JUDICATA, AS ESTABLISHED BY FINAL JUDGMENTS IN 1947, 1948 AND 1949.

In April of 1947, the District Court, after hearing upon notice, allowed to the plaintiffs, the Shareholders Protective Committee, representing the 16,000 depositors of the Long Beach Association, $50,000.00 on account of attorneys' fees, and approximately $17,000.00 on account of expenses [Apl. No. 12511, R. 2350-2363].

Before the signing of the formal order, the appellants filed proceedings for a writ of "mandamus, and/or prohibition, and/or injunction." Thereby, appellants made the District Judge a defendant in the United States Supreme Court because he had attempted to allow, from recaptured assets in the Registry of the District Court, funds to determine the validity of the summary seizure and confiscation of the Long Beach Association. Appellants sought, by said writs, to "prohibit any further allowance therein and to enjoin any payments heretofore allowed."

The United States Supreme Court denied the writs (*Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, June 23, 1947). In denying the writ, the United States Supreme Court had before it (printed in the District Court's "Return to Rule to Show Cause"), the District Court's proposed finding No. 2,

> "That the Court has jurisdiction of the persons and subject matter involved." [Apl. No. 12511, R. 1448.]

After denial of the writs by the United States Supreme Court, the District Court signed its findings of fact, conclusions of law and order, including the same finding,

> "That the Court has jurisdiction of the persons and subject matter involved." [Apl. No. 12511, R. 1448.]

Appellants immediately applied to the District Court for a stay.

In denying such stay, the District Court found in part:

> ". . . that the litigation is presently continuing, and unless the fees and expenses heretofore allowed be paid, the plaintiffs may be deprived of their rights to pursue the litigation to an ultimate judgment on the merits; and
>
> "(12) It further appearing that the assertion of the rights and claims by the plaintiffs did require and does require that they and counsel take an active part in the litigation and in the incurring of enormous expense for the preparation of pleadings, (which in this case have been voluminous), multitudinous court appearances, for the preparation and printing of records and briefs on appeal, and other incidents to litigation; that it presently appears that the within action was commenced and is maintaned by the plaintiffs in good faith for the avowed purpose of protecting and preserving the rights, interests, assets and properties in said association of themselves and others similarly situated, and that due process of law for ultimate justice requires a trial and determination on the legal merits, or both legal and factual if the issues are not disposed of on the legal merits alone, and that in view of the whole record and files herein it would amount to a denial of due process to compel plaintiffs to pay the

> expenses and counsel fees heretofore allowed or to compel plaintiffs and counsel to await the final determination of the issues of said litigation for the payment of said fees and expenses] . . ." [Apl. No. 12511, R. 2464-2478.]

Appellants immediately applied to this Honorable Court of Appeals for a stay [Apl. No. 11751], and on December 8, 1947, after full briefing and argument, this Honorable Court of Appeals denied such stay. Thereafter on February 6, 1948, appellants dismissed their appeal, rescinded the appointment of the conservator of the Long Beach Association, ordered him to account with the District Court for the $26,000,000.00 in cash, government bonds, negotiable securities, and other assets of the Association which he had seized without receipt or acknowledgment of any kind. [H. L. B. B. Resolution 388, Apl. 12511, R. 3404-3405.]

Such finding became *res judicata*, law of the case and final forever when appellants on February 6, 1948, dismissed their appeal No. 11751 from the judgment containing such finding of jurisdiction over the person and subject matter [Apl. No. 12511, R. 3549-3552].

The motive for dismissal of appeal has no effect on the finality of the judgment appealed from.

In *United States v. Munsingwear*, 340 U. S. 36, 95 L. Ed. 36 (1950), the U. S. Supreme Court said:

> ". . . There is no question but that the District Court in the injunction suit had jurisdiction both over the parties and the subject matter. And its judgment remains unmodified. . . . The question . . . having been determined in the first suit, is therefore laid at rest by a principle which seeks to

bring litigation to an end and promote certainty in legal relations.

". . .

"In this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights.

". . .

"The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation.

"Affirmed."

The same principle was announced in the case of:

Stoll v. Gottlieb, 305 U. S. 165, 83 L. Ed. 104 1938).

The Supreme Court said:

". . . Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter . . ." (Emphasis added.)

and

". . . We see no reason why a court, . . . should examine again the question whether the court making the earlier determination on an ac-

tual contest over jurisdiction between the parties, did have jurisdiction of hte subject matter of the litigation . . ." (Emphasis added.)

In

Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 (1940) (U. S. Supreme Court) (affirming Court of Appeals for Ninth Circuit, 99 F. 2d 651),

the Supreme Court said:

"One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties . . ." (Citing authorities.) (Emphasis added.)

In

Baldwin v. Iowa Traveling Men's etc., 283 U. S. 522, 75 L. Ed. 1244 (1931),

the Supreme Court said:

". . . It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction . . . the special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. . . ."

the Supreme Court further said:

". . . It had also the right to appeal from the decision of the Missouri District Court, . . . It elected to follow neither of those courses, but,

after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. . . ." (Emphasis added.)

Other U. S. Supreme Court decisions to the same effect are:

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231 (U. S. Supreme Court, 1932) (an appeal from Court of Appeals, Ninth Circuit);

Chicot, etc. v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329 (U. S. Supreme Court, 1940).

The point of *res judicata* as to attorneys' fees, of course, has equal application to many other final judgments of the court below.

In the five years in which this litigation has been before the courts, the trial court has entered numerous judgments. Some of these final judgments are:

1. Expenses and fee order of 1947 (appeal dismissed) in appeal No. 12511, R. 2350.
2. Intervention orders clearing titles to realty (appeal dismissed) in appeal No. 12511, R. 2852.
3. Judgment to restore Long Beach Association, January 23, 1948 (no appeal), in appeal No. 12511, R. 3442 and 8310.

4. Order to deposit $14,000,000.00 in assets, March 13, 1948 (no appeal—complied with) in appeal No. 12511, R. 3772 and 8399.

5. Order to release excess collateral (no appeal—complied with) in appeal No. 12511, R. 3869 and 8526.

6. Preliminary injunction of parties in Northern District action, No. 28203-G (no appeal—court recognized), in appeal No. 12511, R. 4722 and 8362.

7. Preliminary injunction and remand to State Court, action No. L.B.-C. 14492 (no appeal—court recognized) in appeal No. 12511, R. 5798 and 8377.

8. Order allowing appellees' expenses (final—not appealed) in appeal No. 12511, R. 6427.

9. Order allowing appellees' attorneys' fees on account (final—not appealed) in appeal No. 12511, R. 6527.

10. Order for substitution of Parties Plaintiff (final—not appealed) in appeal No. 12591, R. 219.

It is the law of this case that the U. S. District Court at Los Angeles has jurisdiction of the subject matter and of the parties, and this is *res judicata.* A full treatment of such judgments and the legal effect will be found in brief for appellee-plaintiff (Shareholders Protective Committee), pages 76 to 92, and in appellee Association's brief, in appeal No. 12511, pages 160 to 180.

B. THE COURT'S JURISDICTION IN INTERPLEADER BECAME FINAL AND CONCLUSIVE UPON EXPIRATION OF TIME TO APPEAL FROM THE INTERPLEADER ORDERS AND JUDGMENTS.

The assets physically in the registry of the Court, in the possession of the Court's Clerk, can leave such custody only by order or judgment of the Court. Once the judgment requiring deposit of such assets into the registry of the Court has become final and been complied with, there can be no further question as to the jurisdiction or power of the Court over such interplead assets. The U. S. Supreme Court in:

Dugas v. American Surety, 300 U. S. 414, 81 L. Ed. 720 (1937),

said:

"3. In the interpleader suit there was an actual, complete and judicially sanctioned payment . . . While the payment was into the court's registry, and not directly to the claimants, it nevertheless was a lawful and effective payment under the Interpleader Act. In effect the first decree converted the claims . . . into claims against the fund paid into the registry; . . .

". . .

"Plainly the court had jurisdiction of both the subject matter and the parties. No appeal was taken from either decree. Therefore Dugas was bound by both decrees. Had he exercised his right to appeal he could have obtained a review of the rulings on

his objection to being brought into the suit . . . But these rulings were all made in the exercise of the court's jurisdiction, were subject to challenge and re-examination only on appeal, and became conclusive on him in the absence of an appeal." (Emphasis added.)

In affirming a decision of this Honorable Court of Appeals, the U. S. Supreme Court in the case of:

Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 (1940) (U. S. Supreme Court, 1940) (Affirming Court of Appeals for 9th Circuit).

"One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (Citing authorities.)

The power of the Court in interpleader over the assets of the San Francisco and Los Angeles Banks became final and *res judicata* upon expiration of the time for appeal from the order interpleading the assets. The only question now open on this appeal is whether or not the Court below committed error in allowing attorneys' fees. The question of the Court's jurisdiction to make such allowance is forever closed.

THE COURT BELOW HAS JURISDICTION IN INTERPLEADER, AND OTHERWISE, OVER THE APPROXIMATELY $14,000,000 OF ASSETS IN THE REGISTRY OF THE COURT AND CAN ALLOW ATTORNEYS' FEES THEREFROM.

A. THE COURT HAS JURISDICTION TO ALLOW ATTORNEYS' FEES FROM FUNDS PROTECTED IN CLASS ACTIONS BY STOCKHOLDERS OF A SEIZED CORPORATION, SUING TO RECOVER THE CORPORATE ASSETS FOR ALL STOCKHOLDERS AS A CLASS.

1. The United States court of equity has inherent power to allow plaintiffs attorneys' fees, "as fair justice to the other party will permit."[19]

Both the U. S. Supreme Court and this Honorable Court of Appeals for the Ninth Circuit have repeatedly reversed the lower courts for failure to do justice between attorneys and litigants. Such reversal of lower courts has occurred when trial courts failed to equitably apportion attorneys' fees against or among both class beneficiaries and adversaries in equitable litigation.

A leading U. S. Supreme Court case is:

Sprague v. Ticonic Bank, 307 U. S. 161, 83 L. Ed. 1184, U. S. Supreme Court, 1939.

This case went from the district court to the Court of Appeals, to the Supreme Court and back, on several occasions.

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[19]*Sprague v. Ticonic Bank,* 307 U. S. 161, 83 L. Ed. 1184, U. S. Supreme Court—1939.

Detailed analysis of that litigation discloses the following chronology and facts:

The appellant sued a National Banking receiver for recovery for herself only (and not on behalf of any class), for assets in the possession of the receiver, which appellant claimed were held as trustee by the bank for which the receiver was appointed.

The trial court granted judgment for recovery by plaintiff only of the trust assets claimed by her. While this judgment was yet pending undecided in the U. S. Supreme Court (certiorari was granted by the Supreme Court, October 18, 1937, and the case decided March 7, 1938), plaintiff ,on February 19, 1938, filed a petition in the district court for allowances of counsel fees to plaintiff from **assets in the hands of the receiver of the National Bank.**

Plaintiff claimed right to counsel fees from all other claimants to similar trust assets in the hands of the receiver because her decision **in favor of herself only** inured to the benefit of their claims.

The application for fees, be it particularly noted, was filed **before** finality of plaintiff's judgment by affirmance by the U. S. Supreme Court.

The district court denied the petition for fees (23 Fed. Supp. 59), and the Court of Appeals affirmed such denial (99 F. 2d 583).

The U. S. Supreme Court, however, reversed both the Court of Appeals and the district court for denying attorneys' fees under these circumstances and, in an opinion (307 U. S. 161, 83 L. Ed. 1184), established the

inherent powers of federal courts, as courts of equity, to enforce and apply all of:

> ". . . that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, . . ."

The U. S. Supreme Court further held that federal courts of equity have:

> ". . . the power not only to give a fixed allowance for the various steps in a suit, what are known as costs 'between party and party,' but also **as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit,** technically known as costs 'as between solicitor and client.' . . ." (Emphasis added.)

The U. S. Supreme Court also said:

> ". . . Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor **to do equity in a particular situation . . .**" (Emphasis added.)

The U. S. Supreme Court further said:

> ". . . the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, **individualization in the exercise of a discretionary power** will alone retain equity as a living system and save it from sterility. In the actual exercise of the power to

> award costs 'as between solicitor and client' all sorts of practical distinctions have been taken in distributing the costs of the burden of the litigation . . ." (Emphasis added.)

The power of a court of equity to do justice, "as between a party and the beneficiaries of his litigation," includes the power to allow attorneys' fees to a bank rendered helpless by summary seizure and confiscation of its entire assets, particularly when the seizure is without notice or hearing, is alleged to be a denial of due process and fair trial, and when the seizing parties have used in excess of $100,000.00 of the seized assets in resisting judicial determination of the validity of the seizure.

The U. S. Supreme Court, in *Sprague v. Ticonic Bank, supra,* said in reversing:

> "The decision of the Circuit Court of Appeals must be reversed so that the District Court may entertain the petition for reimbursement **in the light of the appropriate equitable considerations.**" (Emphasis added.)

This Honorable Court of Appeals for the Ninth Circuit has repeatedly followed this leading Supreme Court decision and reversed lower courts either for failure to allow attorneys' fees or for inadequate allowances.

One of the leading cases in this Circuit is:

> *Monaghan v. Hill,* 140 Fed. 2d 31 (C. C. A. 9, 1944).

A class suit was commenced against the Intermountain Building and Loan Association by several creditors as a class action for the benefit of all creditors and depositors. The U. S. District Court in Arizona appointed a re-

ceiver as a result of which "gross assets valued at more than $2,000,000.00 passed into the hands of the receiver." One of the several attorneys involved applied to the District Court for an allowance on account of attorneys' fees, for traveling expenses, and for an allowance for a certified public accountant. Four expert witnesses, experienced attorneys, testified that $200,000.00 was "a fair and moderate fee." The lowest estimate was $150,000.00. "No testimony of a lower sum was introduced." The District Court allowed $12,500.00 each to two attorneys. The District Court disallowed $10,000.00 asked for the services of the accountant. One of the attorneys appealed. The other accepted the inadequate award of the District Court. This Honorable Court of Appeals reversed the inadequate award, and in so doing said:

> "There is no question that a court can allow to attorneys in class suits, such as that conducted by petitioner and her co-solicitor, fees payable out of the funds recovered for the members of the class who accept the benefits of the attorneys' efforts, New York Dock Co. v. The Poznan, 274 U. S. 117, 121, 47 S. Ct. 482, 71 L. Ed. 955; Trustees v. Greenough, 105 U. S. 527, 533, 26 L. Ed. 1157; Crump v. Ramish, 9 Cir., 86 F. 2d 362, 363. The sum determined upon as constituting a just fee in such cases is largely within the discretion of the trial court and will not be modified on appeal unless there is strong evidence that the amount is excessive or inadequate. Drilling & Exploration Corporation v. Webster, 9 Cir., 69 F. 2d 416, 418; Tracy v. Spitzer-Rorick Trust & Savings Bank, 8 Cir., 12 F. 2d 755, 756; Glidden v. Cowen, 6 Cir., 123 F. 48, 51. *Cf.* Dee v. United Exchange Bldg., 9 Cir., 88 Fed. 2d 372. . . .

". . . In our opinion, the very least award to appellant that could upon the evidence adduced be held to be reasonable is the sum of $50,000. It is our opinion that the District Court arrived at the comparatively small sum of $12,500 through error. United States v. Equitable Trust Co., 283 U. S. 738, 746, 51 S. Ct. 639, 75 L. Ed. 1379; Tracy v. Spitzer-Rorick Trust & Savings Bank, 8 Cir., 12 F. 2d 755, 757; Glidden v. Cowen, 6 Cir., 123 F. 48, 51.

". . . We think the fee of the accountant is one of the necessary expenses chargeable against the fund in the hands of the receiver, and the sum of $10,000 is reasonable in the premises."

In so deciding, this Honorable Court of Appeals in effect ruled that $100,000.00 was the minimum reasonable fee for litigation resulting in $2,000,000.00 coming into the hands of a Federal receiver.

The unattacked findings of the court below demonstrates that there is $14,000,000.00, not merely in the hands of a receiver, but in the Registry of the Court, in the custody of the Court's Clerk, brought there as a result of this litigation. The District Court has allowed $75,000.00 attorneys' fees, from which allowance this appeal is taken. The $14,000,000.00 is finally in the protective custody of the Court below and has been so protected since 1948. The time for appeal from the Order for deposit into the Registry of the Court has long since expired, and the order of deposit is *res judicata* and final. There can be no distinction between the authority of a U. S. Court to allow fees out of assets

in the hands of its receiver or in the hands of the Clerk of the Court. If anything, the power of the Court over funds in the custody of the Clerk of its Court is greater than over an ordinary equity receiver.

Another case in this Circuit is:

Crump v. Ramish, 86 F. 2d 362 (C. C. A. 9, 1936)

which was the Sunset Oil Co. reorganization proceeding. Attorneys, representing unsecured bondholders, had intervened on behalf of the entire class of such unsecured bondholders. Later, the attorneys asked the Court to fix reasonable compensation for them. The reorganization agreement had provided that only $25,000.00 attorneys' fees should be paid out of general assets but was without prejudice to an application to the Court for additional compensation to be ordered paid by the class represented by such attorneys.

The attorneys, in their petition, asked that 10% of the securities obtained by the class for whom they had litigated be paid to them as attorneys' fees.

> "The (district) court denied the petition 'for want of jurisdiction or legal authority on the part of the Court to grant the same.' Appellants excepted to the order denying the petition and appealed therefrom.
>
> "(1, 2) Unquestionably, the court has the power to allow compensation to the attorneys, to be paid by all in the class who accept the fruits of the labor of the attorneys." (Citing five U. S. Supreme Court, and five Circuit Court of Appeals decisions in support of the statement.)

Other cases upholding such equitable power of the Federal Court to award attorneys' fees are:

Tracy v. Spitzer, etc., 12 F. 2d 755 (C. C. A. 8, 1926);

Glidden v. Cowen, 123 Fed. 48 (C. C. A. 6, 1903);

Dee v. United Exchange Building, 88 F. 2d 372 (C. C. A. 9, 1937).

B. THE COURT HAS PERSONAL JURISDICTION OVER APPELLANTS BY EXPRESS AGREEMENT OF THE ATTORNEY GENERAL OF THE UNITED STATES.

The Court has personal jurisdiction to allow attorneys' fees by express agreement of the Attorney General of the United States that "any further attorneys' fees shall be judicially determined in an adversary proceeding . . .," which agreement was filed with the Court below and relied upon by the Court and counsel.

In December of 1948, Harold Holmes, prominent in the Savings and Loan field and a practicing lawyer of the San Francisco Bay area, was elected President of Appellant San Francisco Bank for the announced and express purpose of restoration of the Los Angeles Bank and dissolution of the San Francisco Bank. Appellant, Home Loan Bank Board, had approved his election for this purpose and had announced that the litigation was compromised and the San Francisco Bank was to be dissolved and the Los Angeles and Portland Banks restored.

As part of such settlement proceedings, a determination of attorneys' fees for various counsel for the Long Beach Association was to be made by the Court below. Appropriate proceedings were had to bring the matter on for hearing before the Court below, and after several hearings at which no objections were made by any of

the stockholders or depositors of any of the institutions involved, a total of $540,000.00 was announced by the Court below, as the amount for attorneys' fees for various counsel in the litigation. Thereafter, appellants "changed their minds," and Assistant Attorney General Peyton Ford came from Washington, D. C., to Los Angeles and stated to the Court:

> "Mr. Ford: We are here in the interests of the Board because they have changed their mind on certain things . . .
>
> "Mr. Ford: If the Board changes its mind again they might lose a lawyer." [Apl. No. 12511, R. 10737.]

(Mr. Ford has since resigned as the Assistant to the Attorney General of the United States.)

Appellants threatened to repudiate the settlement to which they had previously agreed unless said award of attorneys' fees was vacated and set aside. The litigation was then almost three years old, and counsel in whose favor the Court had made its award of attorneys' fees placed their clients' interest above counsel's own personal interest and, relying upon representations and guarantees made to the Court and to counsel by said Peyton Ford, Assistant to the United States Attorney General, consented to vacation and setting aside of the Court's award of attorneys' fees. Such consent was upon the terms and conditions of a letter filed with the Court and made part of the record, and relied upon by the Court and counsel.

The Court made a complete finding on this matter and that finding is not attacked by the appellants on this appeal. Said letter reads in part as follows:

> "The said stipulation and award shall be vacated and any further attorneys' fees shall be judicially

> determined in an adversary proceeding at the conclusion of negotiations for settlement if agreement thereon be reached or in the litigation if such there be." (Appendix, p. 5.)

The Court has found "that in reliance upon said representations in the said letter . . . this Court did make and duly enter its findings of fact, conclusions of law, and order for interim allowance on account of attorneys' fees . . . and which said order and judgment has now become final."

The said letter of Peyton Ford read at the commencement thereof: "Re Paul Mallonee, *et al.* vs. John H. Fahey, *et al.,* No. 5421-P. H. Civil and Consolidated Case No. 5678-P. H. Civil." The words "any further attorneys' fees shall be judicially determined . . . in the litigation . . ." signed by the second highest in the Attorney General's office of the United States clearly and expressly consented to personal jurisdiction over appellants and authorized the Court to make the "judicial determination" incorporated in the award of attorneys' fees here appealed from.

All questions of indispensable parties, lack of jurisdiction over the person, and similar matters, at least insofar as attorneys' fees are concerned, are, by the very terms of this letter signed by the Assistant Attorney General and filed with the Court, forever removed from this case.

There remains only the question of such objections on the merits as appellants might have cared to raise in the Court below. Clearly they cannot raise for the first time

on this appeal, any questions not presented to the Court below on the merits. In the Court below they made no factual objections whatsoever.

> "The Court: I had not noticed it in the Government's objection, that there was no objection either to the value of the services, that is, having any value, nor the fact that the services were rendered * * * Do you raise any question of fact?
>
> Mr. Angell: Not as to the value of the services.
>
> The Court: Or the rendition?
>
> Mr. Angell: Or the rendition."[20] [Apl. No. 12591, R. 348-349.]

They admitted that the services had been rendered and they did not question the value. Attorney Hubert Morrow, a qualified expert, testified the reasonable value of the services rendered was $175,000.00. There was no evidence to the contrary. [Apl. No. 12591, R. 356.]

C. THE COURT HAS JURISDICTION TO ALLOW ATTORNEYS' FEES TO ENABLE THE COURT TO HEAR THE CASE ON THE MERITS.

Jurisdiction of the Court can be determined only by a proceeding before the Court below. At such proceeding, the Los Angeles Bank and its plaintiff stockholders must, of necessity, be represented by counsel. The extent and length of the hearing by which the court below determines its jurisdiction may extend to an entire trial on the merits of the litigation.

In litigation against government officials, decisions of the merits must often be made before decision as to juris-

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[20]Mr. Angell is attorney for appellants.

diction can be reached. Such was the holding of the United States Supreme Court in:

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209 (1947),

wherein the Supreme Court said:

". . . this is the type of case where the question of jurisdiction is dependent on decision of the merits.

"The allegations of the complaint, if proved, would establish that petitioners are unlawfully without respondents' property under the claim that it belongs to the United States. . . ."

". . . But public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. **The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.** . . .

"We intimate no opinion on the merits of the controversy. We only hold that the **District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits."** (Emphasis added.)

The District Court, in 1949, stated in Conclusion No. 4 [Apl. No. 12511, R. 8297], as follows:

"That some of the issues in the main litigation involved, will require a determination of the case on its merits, before a final determination can be made as to the jurisdiction of this Court with relation to certain situations and phases of the litigation, which raise the question of jurisdiction."

In

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231, U. S. Supreme Court, 1932 (an appeal from Court of Appeals, Ninth Circuit),

the United States Supreme Court said:

"The Supreme Court of Idaho had jurisdiction over the parties and of the subject matter in order to determine whether the trial court had jurisdiction . . ."

In

Baldwin v. Iowa Traveling Men's, etc., 283 U. S. 522, 75 L. Ed. 1244 (1931),

the Supreme Court said:

". . . it is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. . . . The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. . . ." (Emphasis added.)

Denial of right of counsel to represent the seized Los Angeles Bank and its stockholders might enable the San Francisco Bank, which has already expended $100,000.00 of the seized assets in preventing the trial on the merits, to escape liability to account for the seized assets by exhausting Los Angeles Bank counsel in a five-year contest over jurisdiction of the Court to decide the case on the merits.

IV.

THE CONSOLIDATED ACTIONS PRESENT APPROPRIATE CLAIMS FOR EQUITABLE RELIEF, WHICH HAVE ALREADY RESULTED IN FINAL JUDGMENTS DISPOSING OF A PORTION OF THE ISSUES.

A. PLAINTIFFS CAN MAINTAIN JUDICIAL REVIEW FOR CORRECTION OF UNCONSTITUTIONAL OR ILLEGAL SEIZURES OF PROPERTY PHYSICALLY WITHIN THE TERRITORY OF THE COURT.

The actions are *in rem* to quiet title to, to recover possession of, and for an accounting concerning, $46,000,000.00 of assets of the seized Los Angeles Bank, and $26,000,000.00 of the seized Long Beach Association. The majority of such assets consist of notes and trust deeds, pledges of security, government bonds, and other tangibles.

The District Court has found,

> "That all of the assets, and properties, herein described, notes, deeds of trust, United States Government Bonds, and other collateral are physically within the confines and boundaries of the Southern District of California and are thus physically within the jurisdiction of this Court . . . That all of the thousands of parcels of real property, homes of the borrowers of Long Beach Federal Savings and Loan Association specifically described in said deeds of trust herein elsewhere described in detail are situated within the confines of the Counties of Los Angeles and Orange, State of California, all physically within the boudaries of the Southern District of the said United States District Court.
>
> "That all of the United States Bonds hereinafter specifically described are physically located at the Los

Angeles Branch of the Federal Reserve Bank of San Francisco, in the City of Los Angeles, County of Los Angeles, State of California, within the confines of, and boundaries of, the United States District Court for the Southern District of California." [Apl. No. 12511, R. 8412-8525.]

No appeal was ever taken from these findings. They are, therefore, final and conclusive. The issues of this litigation are: who owns, and who is entitled to the possession of, these assets—the Los Angeles Bank and the Long Beach Association, from whom they were physically seized, without notice or trial or the San Francisco Bank, which claims title and possession to such assets under the administrative orders, No. 5082, No. 5083 and No. 5084. [Apl. No. 12511, R. 8225.]

These orders read in part:

"All assets and property of any kind or nature of such bank . . . are hereby transferred to . . ."

the San Francisco Bank.

To say that the owners of over $70,000,000.00 of seized assets cannot even apply to the Courts to determine the validity of confiscation of such assets by executive fiat, claimed to be in excess of statutory authority, is to deny the constitutional guarantees of due process.

The U. S. Supreme Court in *Marx v. Hanthorn,* 148 U. S. 172, 37 L. Ed. 410 (U. S. Supreme Court, 1893) said:

"A statutory power, to be validly executed must be executed according to the statutory directions . . .

". . . We think the conclusion reached by the courts generally may be stated as follows: . . .

> that the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land."

Ownership of property, the right to corporate existence, stockholders rights in a corporation which they organized and created, do not all exist or perish, dependent upon the pleasure or whim of an administrative official. The ownership of $46,000,000.00 does not disappear over night at any time that a Commissioner decides to transfer ownership and possession to a palace favorite.

Due process of law requires notice, hearing, trial, and court review before confiscation of property and corporate death can be decreed; nor can instantaneous dissolution of the corporate owners foreclose and preclude the rights guaranteed under the Constitution.

In

> *Joint Anti-Fascist v. McGrath,* 341 U. S. 123, 95 L. Ed. 817 (1951),

the United States Supreme Court devoted 90 pages to consideration of due process, as applying to actions of the Attorney General in, without notice or hearing, listing certain organizations as communistic.

Appellants there raised, as do appellants here, the question of "standing to maintain the suit," "non-reviewability of administrative orders," etc. The various opinions of the Justices in concluding that the action was arbitrary and unconstitutional, if done without notice and hearing, point the road to decision of this appeal.

Mr. Justice Burton said at page 136,

". . . An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination.' It is implicit in a government of laws and not of men. Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it."

Mr. Justice Black said at page 143,

". . . I agree with Mr. Justice Frankfurter that the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and a fair hearing . . ."

Mr. Justice Frankfurter said at page 154,

". . . The fact that an advantageous relationship is terminable at will does not prevent a litigant from asserting that improper interference with it gives him 'standing' to assert a right of action . . ."

Further, on page 162,

". . . 'Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts.' Southern R. Co. v. Virginia, 290 U. S. 190, 199, 78 L. Ed. 260, 266, 54 S. Ct. 148. . . ."

Further, at page 171,

". . . 'The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.' . . . Appearances in

the dark are apt to look different in the light of day. . . ."

Mr. Justice Douglas said at pages 177, 178,

". . . When the Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. . . . Notice and opportunity to be heard are fundamental to due process of law. We would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil. . . . The rudiments of justice, as we know it, call for notice and hearing—an opportunity to appear and to rebut the charge."

B. APPELLANTS ARE NOT IMMUNE FROM SUIT.

Appellants contend that because they hold official positions in the Government of the Untied States, they are immune from all Court action.

The complaints allege that the action of appellants is both unconstitutional and beyond their statutory authority, as well as arbitrary, fraudulent, and malicious. In effect, appellants say that they can violate the Constitution, act without authority, and do so fraudulently and maliciously, and yet no Court can curb them or keep them within constitutional or statutory bounds.

The Administrative Procedure Act, discussed at length at pages 205 to 220 of the brief of appellee Long Beach Federal Savings and Loan Association and at pages 59 to 71 of the brief of appellee, plaintiff (Shareholder Committee) in Appeal No. 12511, together with the cases there

cited, discloses that such immunity from suit does not exist.

Section 10(e) of said Act, Title V, U. S. C. A., Section 1009(e), reads in part as follows:

> "(e) Scope of Review. . . . the reviewing court shall . . . (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; . . ."

In

> *Land v. Dollar,* 330 U. S. 731, 91 L. Ed. 1209 (1947),

the U. S. Supreme Court said:

> ". . . But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment **The dominant inerest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld** . . . (Emphasis added.)

In

Keifer v. R.F.C., 306 U. S. 381, 83 L. Ed. 784, U. S. Supreme Court (1939),

the U. S. Supreme Court held government corporations liable for damages for negligence.

In

F. H. A. v. Burr, 309 U. S. 242, 84 L. Ed. 724, (1940),

the Federal Housing Administrator was held liable to garnishment under process of a state court.

In

R.F.C. v. Menihan, 312 U. S. 81, 85 L. Ed. 595 (1941),

the U. S. Supreme Court held the R.F.C., a wholly government-owned corporation, liable for costs and allowances, and said,

". . . The additional allowance made by courts of equity in accordance with sound equity practice is likewise such an incident. Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777 . . ."

". . . **We think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances.**" (Emphasis added.)

Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777, discussed herein at length on page 45, is a decision of the U. S. Supreme Court,

imposing attorneys' fees against the funds of a whole class for whose benefit the plaintiffs' litigation was prosecuted. The allowance of attorneys' fees against appellants San Francisco Bank and Federal Savings and Loan Insurance Corporation, both "sue or be sued" corporations, is expressly approved by the citation in *R.F.C. v. Menihan,* 312 U. S. 81, 85 L. Ed. 595, of *Sprague v. Ticonic Nat. Bank.*

C. APPELLANTS' ORDERS ARE ALL REVIEWABLE.

Appellees Long Beach Association's brief, in Appeal No. 12511, pages 220 to 250, deals at length with reviewability of appellants' orders. The U. S. Supreme Court, only this year, held in:

> *Universal Camera Corp. v. N.L.R.B.,* 340 U. S. 474, 95 L. Ed. 456 (1951),

and

> *N.L.R.B. v. Pittsburgh Steamship Co.,* 340 U. S. 498, 95 L. Ed. 479 (1951),

that the Administrative Procedure Act applies to judicial review of administrative action taken before the effective date of that Act.

The issues of this litigation include unconstitutionality of the statute, and the action taken under it, as well as the allegation that the action is beyond statutory authority and is arbitrary, malicious, and fraudulent.

An order made without due process is utterly void. The question is not merely one of review but whether the orders legally and constitutionally exist. Neither Congress nor the Executive can confer authority to violate the Constitution or to act beyond the scope of statutory authority.

D. THERE ARE NO INDISPENSABLE PARTIES.

Appellee Long Beach Association's brief, in Appeal No. 12511, pages 250 to 265, deals at length with indispensable parties.

There are no indispensable parties in an action *in rem*. The Court disposes of the property within its jurisdiction, and particularly in the possession of the Court's own Clerk, on deposit in the Court's Registry.

Appellants received their notice. They appeared before the Court and objected to the allowances of the attorneys' fees, and their objections were overruled.

The Court does not need appellants' consent nor any personal jurisdiction over appellants when the Court makes an order to the Court's own Clerk to pay out funds in the Registry of the Court.

In

> *Williams v. Fanning,* 332 U. S. 490, 92 L. Ed. 95 (Dec., 1947),

the U. S. Supreme Court, in passing on an appeal from this Honorable Ninth Circuit Court of Appeals, discussing an order of the District Court at Los Angeles to the Postmaster at Los Angeles, said:

> ". . . No concurrence on his part is necessary to make lawful payment of the money orders and release of the mail unstamped. Yet that is all the court is asked to command. *Reversed.*"

No act of the Washington appellants is required when the District Court orders the clerk to pay out of the Registry, assets in the custody of the Court.

In

Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231 (May, 1949),

the U. S. Supreme Court affirmed this Honorable Court of Appeals for the Ninth Circuit and said:

> ". . . Nothing is required of the Secretary; he does not have to perform any act, either directly or indirectly . . . No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek. The issues of the instant suit can be settled by a decree between these parties without having the Secretary of the Interior as a party to the litigation."

Appellants' summary orders No. 5082, No. 5083, and No. 5084 [Apl. No. 12511, R. 8225] purported to transfer the title of the Los Angeles Bank's assets to the San Francisco Bank. Aside from appellants' orders, the San Francisco Bank has no existence. $14,000,000.00 of the assets appellants seized are now in the Registry of the Court. Appellants do not deny that they received due notice, made such objections as they desired and were heard. Appellants are in no sense indispensable.

They can come to the Court where the assets are and make their claims, or they can abandon the assets and let the Court proceed; but they cannot by remaining in Washington, D. C., prevent this Court in Los Angeles from acting upon funds in the Registry of its Clerk at Los Angeles.

Appellants seek to exercise authority over the ownership of real property in California and themselves transfer that ownership from the Los Angeles Bank to the

San Francisco Bank. Yet, when the Court below makes an order on the Clerk of the Court for the payment of attorneys' fees to contest the validity of such transfers of title, they deny to the Court the very powers they claim for themselves.

In other words, they seek to be in California to affect ownership of the California real estate, but not in California when the Court is to determine the validity of their transfers of trust deeds on that very real estate; in Court enough to object to the payment of attorneys' fees from funds in the Registry of the Court, but not sufficiently in Court to be bound by the Court's judgments in so doing.

E. THE SUIT IS NOT AGAINST THE UNITED STATES.

The United States is not a party to any of these proceedings, although appellants have attempted to cloak their unconstitutional, illegal, arbitrary, and malicious acts, as the acts of the United States. If the act is unconstitutional, unlawful, and unauthorized, it can only be the invidual act of the appellants and not an act of the United States. If the act is constitutional and valid and lawful, it is, or may be, the act of the United States, but neither of these is a matter which can be determined until the trial of the issues on the merits.

By seeking to hide behind the immunity of the United States, appellants are attempting to prevent an inquiry by the Court into the constitutionality, validity, and statutory authority of what they did. In effect, they seek to preven a trial by saying they are beyond all Courts, regardless of what they do.

V.

THE COURT'S POWER TO MAKE INTERIM ALLOWANCES OF ATTORNEYS' FEES IS NOT POSTPONED UNTIL A SUCCESSFUL TERMINATION OF THE LITIGATION.

In

Eggert v. Pacific States Savings & Loan Co., 53 Cal. App. 2d 554 (1942),

depositors of Fidelity Savings & Loan Company sued the Building and Loan Commissioner, and Pacific States Savings & Loan Association, for recovery of assets exclusively for the benefit of Fidelity's depositors. Attorneys for Pacific States defended and lost the litigation. The trial court awarded attorneys' fees both to Fidelity and Pacific States' attorneys. The order in favor of Pacific States' attorneys was appealed. It was affirmed by the California District Court of Appeal which said:

> ". . . It is the general rule that, where for any reason a trustee fails to protect trust assets from adverse claims, a beneficiary may do so and may be awarded counsel fees out of the trust assets, if the defense is conducted in good faith and on reasonable grounds. (Trustees v. Greenough, 105 U. S. 527, 532 [26 L. Ed. 1157]; see, also, Beach on Trusts and Trustees (1897), vol. 2, 1599, §698.) See, also, for the application of the same principle to an analogous situation. (Anderson v. Great Republic Life Insurance Co., 41 Cal. App. (2d) 181, 190 [106 P. (2d) 75].) A different rule does not apply, even though

the beneficiary is unsuccessful in the litigation. (Dingwall v. Seymour, 91 Cal. App. 483, 513, [267 Pac. 327].)"

In *Winslow v. Ferguson,* 153 P. 2d 714, 25 Cal. 2d 274 (1944), the California Supreme Court reaffirmed the power of a court to allow attorneys' fees for bringing assets into the protective custody of the Court. The action was commenced in 1931. In 1934, the Court ordered payment of "not less than $500.00" to attorneys for plaintiffs suing in a class action for all beneficiaries of the trust.

It was not until 1940 that the receiver was made permanent for the purpose of liquidating the trust. In 1941, a further allowance of attorneys' fees was made a prior lien on the trust assets in the custody of the Court. In 1942, the Court attempted to give general creditors of the trust priortiy over the award of attorneys' fees. The attorney was absent in military service and upon his return appealed from the order making the attorneys' fees inferior to the creditors' claims. The Supreme Court of California reversed and said (p. 719):

". . . Where a lawyer has rendered such valuable service as to make available a fund for a class, even though he appeared for only one claimant, it is equitable that his compensation and expenses should come from the entire fund saved for all classes concerned berfore it is distributed. (Sprague v. Ticonic Nat. Bank, 307 U. S. 161, [59 S. Ct. 777, 83 L. Ed. 1184].) . . .

"It would be wholly out of line with the traditional concept of equitable practice to pay the expenses of a receiver and the fees of his counsel prior to the participation of any creditor or beneficiary and at the same time to subordinate the payment of fees to the attorney who has invoked the powers of the court of equity to appoint that same receiver. The expense incurred by a litigant for legal services in causing the appointment of a receiver is as much an expense of administration as the charge of the receiver's counsel and should have priority to the same extent. (Farmer's Loan & Trust Co. v. Green, 5 Cir., 79 F. 222, 24 C. C. A. 506; Muskegon Boiler Works v. Tennessee Valley I. & R. Co., D. C., 274 F. 836; McLane v. Placerville & Sacramento Valley R. Co., 66 Cal. 606, 622, 623, 6 P. 748.) . . .

"Not only is it established that the litigant is entitled to be compensated for the expense he has incurred in the prosecution of such an action, but there is created in favor of the attorney who renders the service an equitable lien against the fund so preserved. Central R. & B. Co. v. Pettus, 113 U. S. 116, 5 S. Ct. 387, 28 L. Ed. 915; Colley v. Wolcott, 8 Cir. 187 F. 595, 109 C. C. A. 425; Muskegon Boiler Works v. Tennessee Valley I. & R. Co., D. C., 274 F. 836.

". . . That certain beneficiaries of the trust undertook to institute the action necessary to preserve the trust assets, and another beneficiary intervened for the same purpose, are but formalities of the litigation which do not affect points of substance herein."

In *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, in this very litigation, the U. S. Supreme Court in 1947 said:

> ". . . an allowance of $50,000 will hardly wreck a $26,000,000 institution during the time it would take to prosecute an appeal."

and at the same time in *Fahey v. Mallonnee,* 332 U. S. 245, 91 L. Ed. 2030 (1947), the U. S. Supreme Court reversed a judgment for removal of the conservator and restoration of the Association. In so doing, the Supreme Court said:

> "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies."

The U. S. Supreme Court further said:

> "It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, and we make no determination or intimation concerning the merits of these issues or as to other remedies or relief than that in the judgment before us."

By their two decisions, announced simultaneously, the U. S. Supreme Court directed a trial on the merits and

made adequate provisions that plaintiffs should be financed to pay their counsel for such trial.

If the district court was without power to allow fees prior to final judgment, would the Supreme Court of the United States have refused a writ of prohibition, and would this Honorable Court of Appeals, in December of 1947, denied a stay of the same order that the Supreme Court had refused to prohibit?

The only question in this present appear from attorneys' fees is whether or not the litigation should be tried.

The District Court before whom it has been pending for more than five years has found that these actions

> ". . . are being prosecuted and maintained by the plaintiffs therein, and each of them, through their respective counsel of record, in good faith and upon reasonable grounds."

The appellants have not attacked this finding in any way, nor pointed to any evidence contrary thereto.

The Congressional Investigating Committee in 1946 condemned the seizures of the Los Angeles Bank and recommended its immediate restoration.

No just cause has been shown for reversal of this award thereby denying plaintiffs the right to counsel, to a hearing, and to a trial on the merits in the court below.

VI.

A. LITIGATION OF THIS MAGNITUDE, INVOLVING THE CONSTITUTIONAL GUARANTEES OF THOUSANDS OF DEPOSITORS IN HUNDREDS OF SAVINGS INSTITUTIONS, SHOULD NOT BE DECIDED UPON A COLLATERAL ISSUE PRIOR TO FULL HEARING ON THE MERITS.

Appellants, by a series of appeals of subsidiary or preliminary questions, seek to escape a full hearing on the merits in the court below, and urge upon this court, in appeals from preliminary injunction, appeals from interim allowances of attorneys' fees, and appeals from interim allowances of special master fees, and other collateral issues, a consideration of this voluminous record, before final decision of all of the issues. Appellants make these efforts notwithstanding their failure to appeal from previous final judgments disposing permanently of portions of the litigation.

The U. S. Supreme Court has refused to permit piecemeal appeals to dispose of major issues in advance of a trial on the merits.

In

> *Deckert v. Independence Shares Corp.,* 311 U .S. 282, 85 L. Ed. 189 (1940)

the U. S. Supreme Court said:

> "It is enough at this time to determine that the bill contains allegations which, if proved, entitle petitioners to some equitable relief. **Whether or not they sufficiently allege** or prove **their right to all of the relief prayed** in the bill we do not decide **because the question is not before us.** . . .

". . . The Circuit Court of Appeals properly did not consider them on the merits, and if ultimately there is an appeal from a final decree the correctness of these orders may be examined." (Emphasis added.)

In

Munoz v. Porto Rico Ry. Light & Power Co., 83 Fed. 2d 262; (C. C. A. 1, 1936) (Certiorari denied 298 U. S. 689, 80 L. Ed. 1408-1936)

the Circuit Court of Appeal for the First Circuit said:

" 'The appellant sets out 10 asignments of error. They all go to the merits of the controversy, and could very properly be discussed if the case were here after a full hearing . . '

"Where questions both of law and facts are involved and the trial court in its discretion has issued a temporary injunction to preserve the *status quo* until these questions can be presented on final hearing, this court on appeal will not undertake to find the facts or to lay down rulings on specific issues . . ." (Emphasis added.)

In

Publicity, Etc. v. Collector Internal Revenue, 139 F. 2d 583 (C .C. A. 8, 1943)

the Circuit Court of Appeals for the Eight Circuit said:

". . . The Federal Rules of Civil Procedure do not sanction the disposition of doubtful issues of fact or law upon motions to dismiss for insufficiency of pleadings. The Rules contemplate a determination of all such issues by the trial court after a hearing, and that the trial court shall make findings of fact and conclusions of law, to the end that the parties

to the litigation and the reviewing court may know the exact factual and legal basis for the trial courts' decision . . .

"(4) While we shall not, upon this appeal, express any opinion as to the merits of this case, **we consider it important that the usefulness of the statutory remedy of interpleader, which has been greatly liberalized by the Interpleader Act of 1936 and by Rule 22 of the Federal Rules of Civil Procedure, shall not be impaired by narrow and restrictive rulings** which might prevent bona fide claimants, with meritorious claims to a fund deposited by a stakeholder, from securing an adjudication of their rights . . ." (Emphasis added.)

In

Montgomery Ward & Co. v. Langer, 168 F. 2d 182 (C. C. A. 8, 1948),

the Circuit Court of Appeals for the Eighth Circuit said at page 186:

". . . It is not for an appellate court to indulge in speculation as to facts which, if established, would defeat the class suit theory upon which an action is brought. Railway Express Agency, Inc., v. Jones, 7Cir., 106 F. 2d 341, 343. A suit cannot properly be dismissed as not involving a controversy within the jurisdiction of the court unless the facts of record create a legal certainty of that conclusion. Barry v. Edmunds, 116 U. S. 550, 559, 6 S. Ct. 501, 29 L. Ed. 729; Deputron v. Young, 134 U. S. 241, 252, 10 S. Ct. 539, 33 L. Ed. 923. . . ."

B. A TRIAL IS NECESSARY.

The United States Supreme Court, in

Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91 L. Ed. 2030 (1947),

said:

". . . Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies. . . .

"It is obvious that there is more to this litigation than meets the eye on the pleadings. . . ."

The Supreme Court has already decided adversely to appellants' contentions that the fradulent acts of public officials are not reviewable by the courts.

CONCLUSION.

The Court has found in numerous now final judgments that it has jurisdiction "of the subject matter and persons involved."

The Court has found that the litigation is being prosecuted in good faith and on reasonable grounds.

The Court has found that the Los Angeles Bank was seized and denuded of all its assets.

The Court has found evidence of intimidation to prevent the obtaining of counsel.

The Court has found the appellants have used in excess of $100,000.00 of the seized assets for payment of fees to their own attorneys.

These findings are all either final or are admitted by appellants.

Under these circumstances, the Court below, after four years of litigation, has allowed $75,000.00, as an interim

allowance for attorney fees to permit a trial on the merits.

The question to be decided by this Court of Appeals on this appeal is whether or not such a trial on the merits shall be had as directed by the United States Supreme Court, or whether these seizures and confiscations on the flimsy pretexts of "economy and efficiency" shall be permitted to go forever unquestioned and untried.

If appellants succeed in preventing this allowance of attorneys' fees, their summary confiscation, without notice, hearing or trial, in defiance of every concept of fair play and due process, will have achieved at least a part of their intent.

They will, by the very success of their arbitrary action, have cut off or crippled the power to question the validity of what they did.

A trial is necessary.

A denial of counsel is a denial of due process.

The order allowing from funds in court, as interim attorneys' fees to appellees, 1/7th of 1% of appellees own seized assets to enable them to obtain a trial on the merits of the seizure and confiscation of their solvent bank and its $46,000,000.00 of assets, should be affirmed.

"The Labourer Is Worthy of His Reward." (I Timothy 5-18; Luke X-7.)

Respectfully submitted,

CHARLES K. CHAPMAN,

Attorney for Appellee, Long Beach Federal Savings and Loan Association.

WYCKOFF WESTOVER,

Attorney for Appellee, Shareholders' Protective Committee.

Exhibit A.

In the District Court of the United States, in and for the Southern District of California, Central Division.

Mallonee, *et al.,* Plaintiffs, vs. Fahey, *et al.,* Defendants.

Federal Home Loan Bank of Los Angeles, *et al.,* Plaintiffs, vs. Federal Home Loan Bank of Portland, also sometimes known and referred to as the Federal Home Loan Bank of San Francisco, *et al.,* Defendants.

Civil Action No. 5421-P.H. (and consolidated, related and enjoined actions No. 5678-P.H., in said Southern District, No. 7989-W.M., in said Southern District, No. 28203-G in the Northern District, and No. 14492 in the Superior Court of California).

Order.

An application was made *ex parte* for a stay of the Order this day signed, directing the payment of the sum of $67,500.00 to O'Melveny and Myers and Richard Fitz-Patrick, as and for attorneys' fees on account for services heretofore rendered in the within consolidated actions, and the sum of $7,500.00 to W. I. Gilbert, Jr., as and for attorneys' fees on account for services heretofore rendered in the within consolidated actions, and there was present the following counsel: Philip H. Angell and Irving G. Bishop, Paul Fitting, Assistant United States Attorney, Charles K. Chapman, Wyckoff Westover, W. I. Gilbert, Jr., Pierce Works, of O'Melveny and Myers, all appearing for the various parties for whom appearances have heretofore been made by said respective counsel.

The within litigation has been pending since May 27th, 1946; it is of an extremely complex nature; all parties to the within proceeding on the allowances of attorneys fees

have proceeded with diligence and good faith to bring the multiple claims among the numerous parties in the actions in chief to issue; at least since May 10, 1949, if not from the inception of the litigation, all parties have proceeded on the basis that no fees would be collected by counsel in whose favor the above order runs except upon court order, after adversary proceedings; the matter of the entire litigation is proceeding in one phase or another almost daily and requires the constant attention of counsel; the objections to the payment of the fees directed to be paid by the above order, were based entirely on matters of law which have heretofore been repeatedly urged upon and repeatedly rejected by this court and have been set forth in various findings, orders and judgments; reference to which is hereby made, from which judgments and orders either no appeal was taken, or the time for appeal has long since expired, or in some instances appeals were taken and later dismissed.

In view of the foregoing it appears that it would be an abuse of discretion and a denial of the right to counsel, to grant a stay of the above order, and the same is denied, except as follows:

It Is Hereby Ordered, that a stay is hereby granted until 5:00 o'clock P.M., June 29, 1950, on said Order, directing the payment of attorneys' fees on account, on condition that on or before said date and hour, any party desiring to appeal shall have filed notice of appeal, and shall also on or before said date and hour have filed application on notice to all counsel hereinbefore named, for stay of said Order with the United States Court of Appeals for the Ninth Circuit.

If such notice of appeal is not filed on or before said date and hour, and if such application for stay is not made

on or before said date and hour, then and in that event the within stay shall expire at 5:00 o'clock P. M. on June 29, 1950, and the Clerk of this Court is hereby directed to forthwith pay the above sums in accordance with the terms of said order.

In the event such notice of appeal and such application for a stay shall have been filed on or before said date and hour, then and in that event a stay is granted as to the payment of the monies provided by said order until the first occurring of either of the following events:

(a) The granting of a stay by the United States Court of Appeals for the Ninth Circuit, pending its decision; or

(b) The denial of such stay.

Dated this 19th day of June, 1950.

7:25 P. M.

s/ PEIRSON M. HALL
PEIRSON M. HALL, Judge.

Book 66, page 569.

Filed Jun. 19, 1950. Edmund L. Smith, Clerk. By S. W. Stacey, Deputy Clerk.

Judgment entered June 19, 1950, Book 66, page 569. Edmund L. Smith, Clerk.

Exhibit B.

United States Department of Justice
United States Attorney
Southern District of California

600 Federal Building
Los Angeles 12

April 27, 1949

Messrs. Westover & Smith,
Attorneys at Law
Suite 1007,
1015 Pacific Southwest Building,
216 West 6th Street,
Los Angeles 14, California.

Re: Paul Mallonee et al. vs. John H. Fahey, et al. No. 5421-P.H. Civil and Consolidated Case No. 5678-P.H. Civil.

Gentlemen:

At our conference in the office of the United States Attorney yesterday, April 26th, you requested that, prior to further consideration of our proposal for settlement, I submit to you a final offer in writing stating the terms in respect to attorneys' fees, on which negotiations may proceed. After consultation with the Home Loan Bank Board, I am authorized to state that the Board is prepared in respect to matters of attorneys' fees, in addition to the proposal heretofore made, to negotiate on any one of the following bases:

(1) The attorneys' fees, whether interim or final, shall be judically determined in an adversary proceeding and the stipulation dated March 22, 1949,

and the subsequent award of April 1, 1949, be vacated, or

(2) Following the suggestion of the court, one-third of the amount awarded by the court in its decision of April 1st shall be paid now on proper order of the court (less the deduction of $50,000 previously paid, as provided in presently proposed order), regardless of the outcome of negotiations for settlement; the said stipulation and award shall be vacated and any further attorneys' fees shall be judicially determined in an adversary proceeding at the conclusion of negotiations for settlement, if agreement thereon be reached, or in the litigation, if such there be, or

(3) Following the suggestion of Mr. Fussell, one-third of the amount awarded by the court in its decision of April 1, 1949, to be paid now as an interim allowance on account by order of the court (less the deduction of $50,000 previously paid as provided in presently proposed order) regardless of the outcome of any further negotiations for settlement; the said stipulation and award shall be vacated and any further attorneys' fees shall be determined by the court on such showing as the court may require, subject to agreement of the parties as to the maximum amount thereof at the conclusion of negotiations for settlement, if agreement thereon be reached. If no settlement be reached, any additional fees shall be judicially determined in said litigation.

The other terms of our letter of April 16, 1949, remain unchanged, except that the provisions of numerical paragraph 4 is open to further consideration in accordance with our prior conversation.

It is requested that you indicate your position on these suggestions by 12:00 noon, Monday, May 1, 1949.

Your proposal for an alternative to a dismissal with prejudice should be delivered to us by the same date and hour.

There is no occasion to indicate any specific amount of attorneys' fees until you have stated which of the above propositions is acceptable to you.

Yours very truly,

/s/ PEYTON FORD,
The Assistant to the
Attorney General.

P. S.: The time is set for Monday because of the shortness of time involved.

/s/ P. F.